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Environmental Cleanup Office

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**STATE OF WASHINGTON
SNOHOMISH COUNTY SUPERIOR COURT**

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

HOUSING AUTHORITY OF THE
CITY OF EVERETT,

Defendant.

NO. **04 2 10919 0**

COMPLAINT

Plaintiff, State of Washington, Department of Ecology ("Ecology") alleges as follows:

I. DESCRIPTION OF ACTION

1. This action is brought on behalf of the State of Washington, Department of Ecology, to enter a settlement agreement, known as a Prospective Purchaser Consent Decree ("Decree") for a remedial action at a facility where there have been releases and/or threatened releases of hazardous substances.

2. The Complaint and settlement are limited to the scope of the Decree. The facility, or Site, is referred to as the Everett Smelter Site and consists of property generally located in northeast Everett, Washington, where hazardous substances released from historic smelter operations have come to be located. EHA intends to purchase 15 residential properties,

COMPLAINT

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ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

1 collectively referred to as the "Property" or "Asarco Houses," which comprise a portion of the
2 upland area of the Site and consist of single-family and duplex houses located north of Butler
3 Street on Hawthorne Street, Pilchuck Path and East Marine View Drive in Everett, Washington.
4 EHA will then remediate the Asarco Houses pursuant to the terms and conditions of the Decree.

5 II. JURISDICTION

6 3. This Court has jurisdiction under RCW 70.105D, the Model Toxics Control Act
7 ("MTCA"). This Court has jurisdiction over the subject matter and over the parties pursuant to
8 MTCA. Venue is proper in Snohomish County, the location of the Site at issue.

9 4. Authority is conferred upon the Washington State Attorney General by RCW
10 70.105D.040(5)(a) to agree to a settlement with any person not currently liable for remedial
11 action at a facility, who intends to purchase, redevelop or reuse a site if, after public notice,
12 Ecology finds the proposed settlement would lead to a more expeditious cleanup of hazardous
13 substances in compliance with cleanup standards under RCW 70.105D.030(2)(e). In addition,
14 Ecology must also find that the proposed redevelopment or reuse is not likely to contribute to
15 the existing releases or threatened releases or interfere with remedial actions that may be needed
16 on the Site or increase health risks to persons at or in the vicinity of the Site. Lastly, the
17 Attorney General must find that the settlement will yield substantial new resources to facilitate
18 the cleanup and expedite remedial action consistent with the rules adopted under RCW
19 70.105D. Ecology and the Attorney General have made the required finding. Under RCW
20 70.105D.040(4)(b), such a settlement must be entered as a Consent Decree issued by a court of
21 competent jurisdiction.

22 5. Ecology has determined that a release or threatened release of a hazardous
23 substance has occurred at the Site.

24 6. Ecology has given notice to the Housing Authority of the City of Everett
25 ("Everett Housing Authority" or "EHA") of Ecology's determination, that upon purchase of the
26 15 residential properties collectively referred to as the "Asarco Houses," EHA will be a

1 potentially liable person as owner and/or operator as defined in 70.105D.020(12) of the Site and
2 notice that there has been a release and/or threatened release of hazardous substances at the Site.

3 III. PARTIES

4 7. Plaintiff Ecology is an agency of the State of Washington responsible for
5 overseeing remedial action at Sites contaminated with hazardous substances under
6 Chapter 70.105D RCW.

7 8. Defendant is the Housing Authority of the City of Everett ("Everett Housing
8 Authority" or "EHA").

9 IV. FACTUAL ALLEGATIONS

10 9. The 15 residential properties that EHA plans to purchase, referred to collectively
11 as the "Asarco Houses," consist of single-family and duplex houses located north of Butler
12 Street on Hawthorne Street, Pilchuck Path and East Marine View Drive in Everett, Washington.
13 The Asarco Houses comprise one portion of the uplands area of the Site. The Site consists of
14 approximately 686 acres. The Asarco Houses portion of the Site consists of approximately 2.5
15 acres.

16 10. The Everett Smelter Site previously hosted a smelter plant that, at the turn of the
17 last century, was one of the largest industrial facilities in Everett. In 1894, the Puget Sound
18 Reduction Company began operating the smelter, refining ores primarily from the Monte Cristo
19 mining district. Some of the ore from the Monte Cristo mining district contained over
20 25 percent total arsenic. To recover arsenic from the ore, an arsenic processing plant was
21 constructed on the southern end of the Everett Smelter Site. The plant consisted of several
22 structures, including additional smoke stacks, flues, ovens and mills, and a large arsenic
23 processing building.

24 11. In 1903, a corporation that subsequently became ASARCO Incorporated
25 ("Asarco") bought and continued operating the smelter. Asarco subsequently dismantled the
26 smelter in 1914 and 1915.

1 12. Asarco sold the smelter and its surrounding land-holdings through a series of
2 transactions between 1914 and 1936 to different buyers, including the Weyerhaeuser Company
3 ("Weyerhaeuser"), the State of Washington Department of Transportation, the City of Everett
4 and Burlington Northern. In addition, 17.89 acres were purchased and subsequently developed
5 into residential neighborhoods. About 25 houses were built on property that is now within the
6 area known as the "Fenced Area." The "Fenced Area" refers to the Former Arsenic Trioxide
7 Processing Area, which comprises one portion of the Site and is generally located south of
8 North Broadway (SR 529), east of Hawthorne Street, west of East Marine View Drive and north
9 of Butler Street, upon which residential structures and improvements have been demolished and
10 are now surrounded by security fencing.

11 13. During an environmental investigation in 1990, Weyerhaeuser discovered an
12 outcrop of slag discovered on the hillside below East Marine View Drive. As part of the
13 investigation, slag, soil, and ground water samples were collected on Weyerhaeuser property
14 and analyzed for the presence of heavy metals. After receiving the data, Weyerhaeuser notified
15 Ecology that a release of a hazardous substance had occurred at the Everett Smelter Site.

16 14. Ecology conducted an initial investigation of the Smelter Site in December 1990.
17 The investigation included a site visit, historic research of the area, and a review of the data
18 previously submitted by Weyerhaeuser.

19 15. Ecology conducted a Site Hazard Assessment (SHA) of the Smelter Site in
20 February 1991. The SHA consisted of a magnetic survey, to attempt to locate the extent of
21 buried slag, and collection of 20 surface soil samples that were analyzed for metals. Laboratory
22 analysis demonstrated releases of arsenic, cadmium, and lead to the soils found in the
23 residential area on the site.

24 16. Ecology conducted a "Pre-Remedial Investigation" (Pre-RI) in May 1991. The
25 Pre-RI consisted of the preparation of a site map and collection of additional soil samples. The
26 purpose of the investigation was to further characterize the nature and extent of elevated

1 concentrations of residual metals that were identified in the SHA. Results of the Pre-RI
2 confirmed releases of arsenic, cadmium, and lead in surface soils throughout the study area.

3 17. By letter dated August 29, 1991, Ecology notified Asarco of its status as a
4 "potentially liable person" under RCW 70.105D.040 after notice and opportunity for comment.

5 18. In April 1992, Ecology issued Enforcement Order No. DE92TC-N147 to Asarco.
6 This Order required Asarco to perform a Remedial Investigation/Feasibility Study and certain
7 Interim Actions to limit exposure of residents to arsenic and other metals at the Smelter Site.

8 19. In March 1994, Ecology issued the first amendment to Enforcement Order
9 No. DE92TC-N147. The first amendment required Asarco to perform additional interim
10 actions and prepare an interim deliverable remedial investigation report. The amendment also
11 required Asarco to undertake additional sampling for the remedial investigation and extended
12 the schedule.

13 20. In 1994 and 1995, Asarco voluntarily implemented a property buy-out program
14 for the homes located in the Fenced Area. All but two of the homes were purchased as part of
15 this program.

16 21. In September 1995, Ecology issued Enforcement Order No. DE95TC-N350 to
17 Asarco. This Order required Asarco to immediately take action to stop the exposure to arsenic
18 of residents, pets, and others who resided in the two remaining houses at 520 and 534 East
19 Marine View Drive, within the Fenced Area. Thereafter, Asarco purchased these properties and
20 the families vacated them.

21 22. Pursuant to Enforcement Order No. DE92TC-N147, Asarco prepared an Interim
22 Deliverable report in April 1994 and a Remedial Investigation and Feasibility Study (RI/FS)
23 report (*Everett Smelter Remedial Investigation and Feasibility Study, prepared by*
24 *Hydrometrics, Inc. for Asarco, Inc. and dated September 1995*) for most of the study area.

1 23. Based on analytical data in the RI/FS report, there is evidence of arsenic and lead
2 in ground water and arsenic and lead in surface water on the Site. Based on other analytical
3 data collected, there is evidence of arsenic and lead in house dust on the Site.

4 24. Subsequent to issuance of Enforcement Order Nos. DE92TC-N147 and
5 DE95TC-N350, Asarco expanded its property buy-out program and purchased all but fifteen of
6 the residences in the area south of Broadway, east of Balsam Lane, north of Butler Street, and
7 west of East Marine View Drive. Since Asarco's purchase, all of the homes located within the
8 Fenced Area have been vacated and demolished. Many of the homes adjacent to the Fenced
9 Area have also been vacated, although Asarco is currently leasing some of these properties,
10 known as the Asarco Houses, for residential use.

11 25. After public notice and comment, Ecology issued the Integrated Final Cleanup
12 Action Plan and Final Environmental Impact Statement for one portion of the Everett Smelter
13 Site (FCAP/FEIS) on November 19, 1999. The FCAP/FEIS required, among other things, that
14 all material within the Fenced Area with an arsenic concentration greater than 3,000
15 milligrams/kilogram (mg/kg, equivalent to parts per million) be excavated and sent off-site to a
16 facility permitted to accept such waste. This requirement was based on concern over leaving
17 high levels of contamination in an urban neighborhood that, if exposed, could constitute an
18 immediate threat to human health. The FCAP/FEIS also requires remediation of the Asarco
19 Houses through removal and containment of material above cleanup levels and remediation
20 levels specified in the FCAP/FEIS.

21 26. As documented in the RI/FS and FCAP/FEIS, the remedial action to be
22 implemented pursuant to this Decree will achieve partial cleanup of the Site by achieving
23 cleanup standards for one portion of the Site, the Asarco Houses. The remedial action to be
24 implemented under the FCAP/FEIS includes (1) removal of all material from the Fenced Area
25 in excess of 3,000 mg/kg of arsenic, followed by (2) removal of all material from the Fenced
26 Area between 150 and 3,000 mg/kg of arsenic and the placement of a minimum of two feet of

1 clean fill, and (3) compliance monitoring activities. The FCAP/FEIS requires remediation of
2 the Asarco Houses through removal and containment of material above cleanup levels and
3 remediation levels specified in the FCAP/FEIS. Because treatment, excavation, disposal, and/or
4 recycling of all hazardous substances at this portion of the Site is not practicable, the remedy for
5 the Asarco Houses of the Site includes elements of on-site containment, through on-site
6 capping, as set forth in the FCAP/FEIS. The remedy therefore includes monitoring and
7 institutional controls.

8 27. In January 2000, Asarco issued the draft *Comprehensive Lowland Area Remedial*
9 *Investigation Report* (LL Report). Asarco's report concluded that it is likely that remediation
10 activities planned for the Fenced Area would be successful in intercepting and removing current
11 sources of metals to ground water and surface water. Asarco's report found that the best
12 approach for addressing elevated arsenic concentrations was to begin with the Fenced Area.

13 28. On June 10, 2002, Ecology issued Enforcement Order No. 02TCPNR-4059 to
14 Asarco. Enforcement Order No. 02TCPNR-4059 required Asarco to perform an interim action
15 to remove the most contaminated material within the Fenced Area, consisting of arsenic
16 concentrations exceeding 3,000 mg/kg. Specifically, the enforcement order required Asarco to
17 excavate and send to an off-site facility all flue dust, arsenic trioxide, soil, and any other
18 material with an arsenic concentration exceeding 3,000 mg/kg.

19 29. Ecology amended Enforcement Order No. 02TCPNR-4059 in December of
20 2002, to require Asarco to include removal of material outside of the Fenced Area with arsenic
21 concentrations exceeding 3,000 mg/kg. The material outside the Fenced Area that is known to
22 have concentrations exceeding the 3,000 mg/kg limit is located along East Marine View Drive.

23 30. Enforcement Order No. 02TCPNR-4059 required Asarco to submit a work plan
24 for accomplishing the required cleanup work. Asarco submitted a draft work plan in December
25 2002. The work plan proposed accomplishing the required work in 2003 and 2004, but
26 acknowledged that delay of removal of material until 2004 would violate the Order. Asarco's

1 work plan indicated Asarco intended to send excavated material to its Asarco Tacoma Smelter,
2 but contained a contingency plan for actions to implement if the material could not be sent to
3 the Asarco Tacoma Smelter.

4 31. In a letter dated March 18, 2003, Ecology approved Asarco's December 2002
5 draft work plan.

6 32. On June 20, 2003, after correspondence established Asarco's inability to meet
7 the April 30, 2003 mobilization date stated in Enforcement Order No. 02TCPNR-4059, Ecology
8 filed suit in Snohomish County Superior Court. The suit sought injunctive relief to cause
9 Asarco to come into compliance with Enforcement Order No. 02TCPNR-4059, and adhere to
10 the schedule which had been set out in the Ecology approved December 2002 work plan.

11 33. On October 20, 2003, the Court entered an Agreed Judgment requiring Asarco to
12 come into compliance with Enforcement Order No. 02TCPNR-4059 and to comply with an
13 agreed schedule/timeline to achieve final removal of material with arsenic concentrations
14 exceeding 3,000 mg/kg by October 31, 2004 and to submit to Ecology a draft As-Built Report
15 documenting such removal by December 31, 2004.

16 34. EHA and Asarco are currently negotiating a Purchase and Sale Agreement for
17 the Asarco Houses.

18 35. The City of Everett has conducted land use planning under Ch. 36.70A RCW,
19 and the Site is designated 1.3, Single Family Residential, by the Everett Comprehensive Plan.
20 The Site has been used for residential purposes and is zoned R-2, single family medium density
21 residential. Any hazardous substances in soil that may remain on portions of the Asarco Houses
22 after the remedial action has been completed pursuant to this Decree will not pose a threat to
23 human health and the environment. In order to enable the work in this Decree to proceed, the
24 City of Everett has agreed to take certain actions, including guaranteeing an EHA loan, granting
25 EHA powers as a community renewal agency, and abandoning certain rights of way and
26 utilities. In a letter dated May 18, 2004, which is attached as Exhibit I to this Decree and

1 incorporated herein by reference, Ecology has confirmed to the City that it does not consider the
2 City to be acquiring liability under MTCA for its role in supporting EHA's purchase and
3 cleanup of these properties.

4 36. EHA intends to facilitate the redevelopment of the Asarco Houses portion of the
5 Site for single family or other residential purposes consistent with applicable City of Everett
6 comprehensive plan designations and zoning regulations as those designations may be revised.
7 EHA intends, as necessary, to seek comprehensive plan and zoning changes to permit higher
8 density residential development than may be allowed under current designations and
9 regulations.

10 V. CAUSES OF ACTION

11 37. Plaintiff realleges paragraphs 1 through 36, above.

12 38. Ecology alleges that, upon purchase of the Property, EHA will be responsible for
13 remedial action at the Site pursuant to Chapter 70.105D RCW and Chapter 173-340 WAC.

14 39. Ecology and EHA have entered into a Prospective Purchaser Consent Decree
15 requiring remedial actions at the Site upon purchase of the Property by the Defendant. The
16 Decree has been subject to public notice and comment under RCW 70.105D.040(4)(a), and a
17 public hearing was held on April 27, 2004. Several comments were received, and Ecology has
18 reviewed and considered the comments.

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1 **VI. PRAYER FOR RELIEF**

2 WHEREAS Ecology and EHA have voluntarily entered into a proposed Decree,
3 Ecology requests that the Court, pursuant to RCW 70.105D.040, approve and order the entry of
4 the proposed Decree. Ecology further requests that the Court retain jurisdiction to enforce the
5 terms of the Decree.

6 DATED this 4th day of June, 2004.

7 CHRISTINE O. GREGOIRE
8 Attorney General

9 
10 KRISTIE E. CAREVICH, WSBA #28018
11 Assistant Attorney General

12 Attorneys for Respondent
13 State of Washington
14 Department of Ecology
15 (360) 586-6762
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